No. 85-1233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Does the Federal Water Pollution Control Act authorize a nuisance action alleging pollution of an interstate body of water to be brought against a discharger (1) in any states where an impact of the discharge is claimed and (2) under the laws of any such states? *

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* The caption of the case in the Court contains the names of all the parties to the proceedings in the court below. (The State of Vermont, as a riparian owner, has been joined as a plaintiff.) The following are subsidiaries (except wholly owned subsidiaries) and affiliates of International Paper Company: Arizona Chemical Company; Envases Internacional S.A.; Indian Lake Dam Holding Corp.; International Paper Italia; International Paper Korea Ltd., IPI Corporation; Rouviere Corporation; Productora de Papeles S.A.; and Sicilcartone S.r.l.

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Petitioner International Paper Company ("IPCo."), the defendant below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed *per curiam* the decision of the United States District Court for the District of Vermont (Honorable Albert W. Coffrin,

U.S.D.J.), denying IPCo.'s motion to dismiss respondents' first cause of action, which relates to the liquid discharges of IPCo.'s plant into Lake Champlain.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is set forth in the Appendix (A1-A3). The opinion of the District Court is reported at 602 F. Supp. 264 (D.Vt. 1985) and is set forth in the Appendix (A4-A25).

The judgment of the Court of Appeals was entered November 4, 1985 (A26-A27). The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §§ 1254(1), 2101(c).

Statute and Rules Involved

Sections 1253, 1319, 1341, 1342, 1365 and 1370 of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §§1253, 1319, 1341, 1342, 1365 and 1370 are set forth verbatim in the Appendix (A28-A55).

STATEMENT OF THE CASE

This is a class action commenced on July 5, 1978 by certain residents of Vermont in Vermont's Addison County Superior Court. On July 25, 1978, it was removed to the United States District Court in Vermont on the basis of diversity of citizenship under 28 U.S.C. § 1332. The complaint has two causes of action. The first cause of action, which is the subject of this petition, claims that IPCo.'s discharges of treated effluent into Lake Champlain "constitute a continuing nuisance to the Plaintiffs." Respondents seek $20,000,000 in compensatory damages, $100,000,000 in punitive damages, and injunctive relief which would require IPCo. to restructure completely its water treatment

system. 602 F. Supp. at 266 (A6). The allegedly offending discharges are made in compliance with IPCo.'s National Pollution Discharge Elimination System permit ("NPDES" permit) (JA 53-54).* *See* discussion infra at 22-23. Respondents' second cause of action claims damages and injunctive relief for air pollution and is not at issue here. 602 F. Supp. at 266 (A6).

In April 1980, the District Court certified, for purposes of the water pollution claims, a plaintiff class comprising Vermont owners of lakeshore property in three townships of the South Lake area of Lake Champlain. The District Court later added the State of Vermont as a riparian landowner (JA 194).

On June 22, 1981, petitioner moved to dismiss respondents' first cause of action pursuant to Fed. R. Civ. P. 12(c) and 56(b), in part on the authority of this Court's decision in *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"). In *Milwaukee II*, this Court held that federal common law, which it had earlier held preempted the application of state common law in disputes over interstate waters, *see Illinois* v. *Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), was itself preempted by the FWPCA. As Lake Champlain is an interstate body of water, petitioner moved to dismiss the first cause of action, arguing that *both* federal and state claims for nuisance were barred. Respondents resisted, arguing that their state law claims of nuisance survived. The District Court reserved judgment on petitioner's motion to dismiss because exactly the same question—whether state common law could be applied to resolve interstate water disputes—was at the time before the United States Court of Appeals for the Seventh Circuit in *Illinois* v. *Milwaukee*, 731 F.2d 403

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* "JA" citations are to the Joint Appendix in the Court of Appeals.

(7th Cir. 1984), *as amended,* Nos. 77-2246 & 81-2236 (May 29, 1984), *cert. denied sub nom. Scott* v. *City of Hammond,* 105 S. Ct. 979 (1985) (*"Milwaukee III"*).

On March 27, 1984, the Seventh Circuit held in *Milwaukee III* that the FWPCA permits common law nuisance actions involving interstate water pollution to be brought *only* in the courts and under the common law of the state in which the discharger is located (which in this case would be New York). Illinois petitioned for a writ of certiorari and this Court invited the Solicitor General to express the views of the United States on the case. The United States urged that certiorari was not appropriate because the Seventh Circuit had correctly construed the decisions of this Court and the FWPCA (JA 204-213). On January 21, 1985, this Court denied the petition for certiorari. 105 S. Ct. 979 (1985).

On February 5, 1985, notwithstanding the decision of the Seventh Circuit in *Milwaukee III* and the denial of certiorari by this Court, the District Court in this case denied petitioner's motion to dismiss, holding, directly contrary to the Seventh Circuit in *Milwaukee III,* that the FWPCA authorized nuisance suits to be brought in any court and under the law of any state where the alleged effects of a discharge occur.* The District Court certified its ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and stayed further proceedings pending disposition by the Court of Appeals.

The Court of Appeals accepted petitioner's interlocutory appeal, and thereafter affirmed the District Court's denial of petitioner's motion to dismiss in a one-page *per curiam*

* The District Court also denied petitioner's motion to dismiss on two separate grounds that are not presented for review in this petition for certiorari.

opinion "essentially for the reasons set forth in [the District Court's] thorough opinion which [we] adopt in all respects. . . ." (3a). It is this judgment of which petitioner seeks review.

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with the decision of the Seventh Circuit in *Milwaukee III,* and with the position previously taken by the United States before this Court on the same issue. Moreover, the issue over which these two Courts of Appeal differ—whether, under the FWPCA, a state (or its citizens) may sue an out-of-state discharger in its own courts and under its own law—is plainly substantial.

The decision below exposes industries and water supply systems which must discharge effluents into interstate waters to the varying statutory and common laws of all of the states whose boundaries touch on waters into which those discharges are made, and gives rise to the possibility of irreconcilable conflicts in the legal obligations to which they will be subject. It will be difficult, if not impossible, for these dischargers to determine what constitutes an acceptable effluent discharge level. In particular, they will face not only a post facto threat of damages, premised upon unascertainable standards, but also the possibility of mandatory and prohibitory injunctions imposing conflicting and irreconcilable discharge standards. Ultimately, lay juries, applying "vague and indeterminate nuisance concepts" from their respective states' laws, may impose liability on industries in other states. This quiltwork of differing authorities threatens to render meaningless the permit scheme of the FWPCA, since dischargers will remain subject to the laws of the various states despite compliance with permits issued by the Environmental Protection Agency and by the state agency where they are located.

Establishment of downstream state jurisdiction over discharges into interstate waters would, moreover, impose a further burden on the federal system. The federal government and the upstream state share a common perspective on discharges into interstate water, as does a state regulating discharges into intrastate waters. In such cases, the sovereign deals with the question as a balancing of its significant interest in maintaining the integrity of its streams against its commercial and economic interest in exploiting an essential resource. A downstream state may lack such perspective, and consider another state's discharges as intrusive and violative because they do not serve the downstream state's interests.*

In addition, the decision would also embroil states in harmful and disruptive disputes over basic interests of state sovereignty engendered by extraterritorial regulation of dischargers which was one of the very concerns that led this Court in *Milwaukee I* to displace state law with federal common law in interstate water disputes.

While the direct conflict between the court below and the Seventh Circuit would alone justify review by this Court, the decision below adopts a construction of the FWPCA and of this Court's precedents which would produce a parochial patchwork of conflicting multi-state regulation of interstate waters. Given that the forty-eight contiguous states have borders contiguous with interstate bodies of water, the issue over which the Second and Seventh Circuits differ will recur frequently, with serious implications. Because of the importance of the issue and the likelihood of its recurrence, a definitive resolution by this Court is needed.

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* While this single-mindedness of approach is likely to be particularly strong for juries in a downstream state considering claims that an industry in an upstream state has polluted its waters, such a mind-set may influence local judges as well.

A. The Decision Below Is in Direct Conflict with the Decision on the Identical Issue by the Court of Appeals for the Seventh Circuit in *Milwaukee III*

1. *The Decision of the Seventh Circuit in Milwaukee III*

As the courts below recognized, their holding is flatly contrary to the holding of the Seventh Circuit in *Milwaukee III*, which represented the culmination of a legal controversy relating to the alleged pollution of Lake Michigan. In *Milwaukee I*, this Court denied Illinois leave to bring suit against the City of Milwaukee under the original jurisdiction of the Supreme Court but held that Illinois could sue in a district court where "federal common law and not the varying common law of the individual states . . ." would control because of "an overriding federal interest in the need for a uniform rule of decision . . ." in the regulation of interstate water discharges. 406 U.S. at 105 n.6 & 107 n.9.

The State of Illinois subsequently sought relief under both federal and state common law and under state statutes in the United States District Court in Illinois, which held that it had jurisdiction over both the federal and state claims in plaintiff's complaint, and granted relief. The Seventh Circuit affirmed the relief but held, in reliance upon *Milwaukee I*, that "it is federal common law and not state statutory or common law that controls in this case . . . and therefore we do not address the state law claims" decided by the District Court. *Illinois* v. *Milwaukee*, 599 F.2d 151, 177 n.53 (7th Cir. 1979). Although Congress had substantially amended the FWPCA in 1972, the Seventh Circuit held that the federal common law recognized in *Milwaukee I* had not been "preempted" by the 1972 amendments.

This Court granted Milwaukee's petition for certiorari, 445 U.S. 926 (1981), "to consider the effect of [the 1972]

legislation on the previously recognized [federal common law] cause of action." 451 U.S. 304, 308 (1981). This Court concluded in *Milwaukee II* that, by the 1972 amendments to the FWPCA, Congress had "occupied the field" of the regulation of discharges into interstate waters, thereby withdrawing from the federal courts the authority to fashion federal common law to resolve disputes over such discharges. 451 U.S. at 317. The judgment of the Seventh Circuit accordingly was vacated and the case remanded for further proceedings.*

Before the Seventh Circuit, plaintiffs again urged that under the FWPCA they could bring an action based upon Illinois law in Illinois courts against out-of-state dischargers.

In an opinion squarely at odds with the holding below, the Seventh Circuit rejected the plaintiffs' argument. Addressing first the precedents of this Court, the Seventh Circuit explained that such decisions as *Milwaukee I* and *II*, *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) and *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981), established that the "claimed pollution of interstate waters is a problem of uniquely federal dimensions requiring the application of uniform federal standards both to guard states against encroachment by out-of-state polluters and equitably to apportion the use of interstate waters among competing users." 731 F.2d at 410-11. Thus, the Court held that federal law must control unless Congress, in the FWPCA, authorized resort to some state law.

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*The State of Illinois also filed a petition for certiorari presenting the question *inter alia* whether the Court of Appeals erred in not addressing the State's state law claims. This Court noted in *Milwaukee II* that Illinois had raised the issue whether state law was *also* available, see 451 U.S. at 310 n.4; however, it ultimately denied Illinois's petition. 451 U.S. 982 (1981).

The Seventh Circuit detailed the extensive provisions in the FWPCA that ensure "protection of the interest of a state whose waters may be affected even though the discharges under consideration occur in a different state." 731 F.2d at 412. *See, e.g.*, § 1341(a)(2) (requiring the Administrator to notify a state that might be affected by a discharge authorized by a permit and providing the objecting state a hearing); § 1342(b) (requiring that a state permit program ensure to any state whose waters might be affected by a discharge notice, an opportunity for a public hearing and the right to submit recommendations, notice of rejection of which must be forwarded to the Administrator who is empowered to prevent issuance of the permit). The court also pointed out that a suit to enforce permit limitations could only be brought "in the judicial district in which the source is located." (§ 1365 (c)).

The Seventh Circuit then turned to an analysis of the "savings clauses" of the FWPCA. It observed that there were two provisions that might permit an action to be brought in one state under its laws against a discharger in another state, sections 1370 and 1365. Section 1370(1) provides that nothing in the FWPCA shall prevent any state from adopting and enforcing a discharge limitation, provided such limitation or standard is not less stringent than those set forth in the FWPCA. The Court of Appeals concluded that, given the emphasis of the FWPCA on the "role of the state where the discharge in question occurs" and "the conflict and confusion which could result from any different construction," § 1370(1) must be limited to state-imposed limitations "with respect to discharges within that state, and not to any right of a state to impose more stringent limitations upon discharges in another state." 731 F.2d at 413.

Section 1370(2) provides in pertinent part that "nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." Again referring to the structure of the FWPCA and the "conflict and confusion" that would result from a contrary interpretation, the court reasoned that in this provision "Congress intended no more than to save the right and jurisdiction of a state to regulate activity *occurring within* the confines of its own boundary water." *Id.* (footnote omitted; emphasis added).

Finally, the court addressed the scope of § 1365(e) which, in addition to limiting suits for enforcement of permit limits to be brought only in the federal judicial district in which the discharge *source* is located, provides that,

> "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ."

The Seventh Circuit construed this provision as preserving a state's (or an individual's) traditional remedy to bring a nuisance action against a discharger in the courts of the state ("State I") whence the discharge came, under the laws of that state. *E.g., Askew* v. *American Waterways Operators,* 411 U.S. 325 (1973). But, the court found it "implausible that Congress meant to confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations on discharges in [or from] State I by applying the statutes or common law of State II." 731 F.2d at 414. If the so-called "savings clause" were so read, the court observed, the "uniformity and state cooperation envisioned by the Act" would be undermined. *Id.* Additionally, it said,

> "[f]or a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontations between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the [FWPCA] would be rendered meaningless."

Id. The court concluded that "the reference in § 1365(e) to statute or common law, like the reference to right or jurisdiction of a state in § 1370, is to a statute or the common law of the state in which the discharge occurs." *Id.* (footnote omitted).

On Illinois' petition for rehearing, the court rejected the State's request to proceed in federal district court in Illinois. The court amended its earlier opinion to clarify that *only* the courts of the discharger's state have jurisdiction over interstate water discharge disputes.* The Illinois interests petitioned for certiorari to review the Seventh Circuit's decision. Before acting on the petition, this Court solicited the views of the United States, especially on the issue of available state law remedies in interstate water discharge cases. The Solicitor General urged that the petition be denied on the grounds that the Seventh Circuit's decision did not conflict with that of any other Court of Appeals and was a correct interpretation of the FWPCA and this Court's

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* "Nothing in our decision precludes the application of Wisconsin or Indiana law by state or federal courts *in one of those states* at the suit of out-of-state parties affected by discharges in that state." *Illinois* v. *Milwaukee,* Nos. 77-2246 & 81-2236, slip op. at 4 (7th Cir. May 29, 1984) (emphasis added).

decisions in *Milwaukee I* and *Milwaukee II*.* This Court denied the petition for certiorari. *Scott* v. *City of Hammond,* 105 S. Ct. 979 (1985).

2. *The Conflicting Decision of the Second Circuit*

While the Vermont district court and the Second Circuit agreed with the Seventh Circuit that, after *Milwaukee I* and *Milwaukee II,* attempts by one state to halt or limit dis-

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* The Solicitor General observed that *Milwaukee I* "left no doubt that the law of one state could not be relied upon to abate a discharge in another state." Brief for the United States as *Amicus Curiae* in *Milwaukee III* at 7 (JA 206). While *Milwaukee II* did not specifically address the question whether state law could be invoked to limit discharges in a second state, the Solicitor General urged that that "opinion lends no support . . . to the contention that such state law remedies were revived by the decision in *Milwaukee II,* and, indeed, the discussion there strongly suggests that such remedies are not available." Brief for the United States at 8 (JA 207).

After passage of the more comprehensive FWPCA, he concluded, the reasons underlying the Court's decision in *Milwaukee I* that federal law, not state law, applies in interstate water disputes "appear considerably stronger." *Id.* at 11 (JA 210). The Act:

> "creates a federal-state partnership in the area of interstate water quality, but it is a partnership in which the federal role is dominant. The federal government establishes threshold pollution control requirements (see, e.g., 33 U.S.C. 1311, 1312, 1316, 1317), subject to state decisions to 'adopt more stringent limitations through state administrative processes, [or] establish such limitations through state nuisance law, and apply them to *in-state* dischargers. *Milwaukee II,* 451 U.S. at 328 (emphasis added). Under this partnership, the states must defer to the federal government's choice of minimum national requirements, but they reserve the unqualified power to determine to what degree they wish to impose more stringent limitations within their borders. *If, as Illinois argues, one state may impose its limitations beyond its borders, this balance of federal and state roles is destroyed.*" *Id.* at 10 (JA 209) (emphasis added).

Petitioner apprised both the District Court in Vermont and the Second Circuit of the position taken by the United States and provided both Courts with a copy of the Solicitor General's brief. (JA 196-213)

charges from another state "implicate uniquely federal concerns" and that absent congressional authorization "state law . . . cannot control interstate water pollution controversies," they acknowledged that they differed with the Seventh Circuit over "the extent to which Congress authorized resort to state law in the FWPCA". 602 F. Supp. at 268 (A11). Contrary to the Seventh Circuit, the courts below held that §§ 1365(c) and 1370—the savings and state authority provisions, respectively—do "authorize[ ] actions to redress injury caused by water pollution of interstate waters under the common law of the state in which the injury occurred" and in the forums of that state. *Id.* at 274 (A25).

The linchpin of the holding that the FWPCA authorizes a state or its residents to bring an action in their courts under their state's laws against an out-of-state discharger is the view that Congress must have believed such an action was available at the time the FWPCA was under consideration in the Congress. The Vermont district court concluded that at the time the FWPCA was being "framed", *i.e.,* drafted and debated, Congress must have believed state law, not federal common law, controlled in disputes over interstate waters. Given this view, the court found it "completely reasonable to assume that Congress believed that a plaintiff suffering in State A might sue under the laws of State A to recover for injuries sustained as the result of pollution emanating from State B." *Id.* at 270 (A15). To the courts below, it was "inescapable that Congress, by passage of the FWPCA's saving clause and state authority provisions, intended to preserve just such an action." *Id.* (A15).

This determination in turn was predicated on the twofold basis that this Court did not decide *Milwaukee I* until after the FWPCA was drafted and debated, and the suggestion in *dicta* in this Court's then recent decision in

Ohio v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 498-99 n.3 (1971), that state law would govern an interstate water dispute. Since § 1365(e) of the Act provides that "nothing in this section shall restrict any right which any person . . . may have under any statute or common law . . . to seek any other relief," the court below reasoned that Congress must have "intended" to preserve the kind of action brought by Vermont and its residents in this case. *Id.* (A15).

B. The Position of the Vermont District Court and of the Second Circuit Misconceives the Effect of this Court's Decisions and Misconstrues the Federal Water Pollution Control Act

This reasoning and, consequently, the courts' decisions are flawed in a number of respects.

Determining Congress' intent at some unspecified point during the lengthy gestation period of any statute, let alone the FWPCA, leads only to controversy and confusion as to what each individual legislator thought the law was during the varying stages of the statute's creation. There is nothing in the legislative history of the Act to support the courts' assumption that Congress viewed *Wyandotte* as representing the "state of the law." Moreover, even the assertion that Congress must have thought that *Wyandotte* represented the "state of the law" before it was overruled is open to serious question because this Court in *Hinderlider* v. *La-Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), had made it clear that state law did *not* apply to interstate water disputes. More important, *Milwaukee I* expressly overruled the cited *Wyandotte* footnote six months *before* final passage of the FWPCA and held explicitly that federal law, not state law, controlled such disputes. *See* 406 U.S. at 102 and n.3. *Milwaukee I* was decided on April 24, 1972; the FWPCA was enacted by Congress on October 18, 1972. During that time, the

Senate and House conference committee thoroughly debated the Senate and House versions of the bill, ultimately issuing a conference report; the House and Senate then debated and enacted the conference bill. Even if one selects the period of the statute's creation as the temporal context for the phrase in § 1365(e) "may have", a suggestion that Congress "relied on" *Wyandotte* and was unaware of *Milwaukee I* is so speculative that it cannot be a reliable guide to Congressional intent.

The courts below relied heavily on this Court's observation in *Milwaukee II*, 451 U.S. at 327 n.19, that, since *Ohio* v. *Wyandotte* remained extant during much of the "legislative activity" leading up to the Act, Congress could not have intended to preserve a federal common law remedy. 602 F. Supp. at 270 (A14). But this hardly justifies the conclusion that Congress *did* intend to revive a particular state law remedy by § 1365(e); in fact, this Court has made plain its view that any such intention was unlikely:

> "The fact that the language of § 1365(e) is repeated *in haec verba* in the citizen-suit provisions of a vast array of environmental legislation, see n.21, *supra*, indicates that *it does not reflect any considered judgment about what other remedies were previously available* or continue to be available under any particular statute." 451 U.S. at 329 n.22 (emphasis supplied).

If one looks to the date that the FWPCA was passed in order to determine the effect of § 1365(e), the savings clauses relied upon by the courts below to support their holding could not have "saved" the state common law remedy alluded to in *Wyandotte* because that case had been overruled and, therefore, no state claim existed, at least one of the nature envisaged by the courts below. As re-

cently as 1981, this Court itself in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 and n.13 (1981), reaffirmed that state law could not govern interstate water disputes, citing *Milwaukee I* with approval. And § 1370, according not only to *Milwaukee III* but to *Milwaukee II*, applies only to state regulation of in-state discharges. 451 U.S. at 327-28.

The courts below sought to bolster the credibility of their interpretation of the FWPCA by emphasizing what they perceived as other flaws in the Seventh Circuit's contrary analysis. But, their analysis does not withstand close examination.

The courts below were of the view, for instance, that the Seventh Circuit's ruling deviated from the choice of law principles laid down by this Court in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), which require a federal court sitting in a diversity case to apply the choice of law principles of the forum state. 602 F. Supp. at 270 (A16). As the United States stated in its amicus brief in *Milwaukee III*:

> "This case is not an ordinary tort suit; it involves the question of pollution of interstate waters which this court repeatedly has held to require special treatment. There is not presented a choice-of-law question in the sense considered in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Rather, it is clear that federal law governs (see *Milwaukee I*, 406 U.S. at 105 & n.7; *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938)), and state law is preempted to the extent required by federal law." Brief for the United States at 13 n.12 (JA 212).

In an attempt to distinguish *Milwaukee III*, the courts below assigned weight to the fact that this case involved

only private parties seeking application of nuisance law that was "not [intended] to regulate the activity of neighboring states. . . ." 602 F. Supp. at 271 (A19). As such, the courts considered the respondents' nuisance claim for substantial damages and injunctive relief to pose at most only a "purely incidental" intrusion upon the sovereignty of the discharger's state, *id.* at 271 (A19), which "merely supplement[s] the standards and limitations imposed by the Act." *Id.* (A17).

This Court has consistently ruled that federal law governs interstate water disputes regardless of the nature of the parties. *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co., supra.* Similarly, in *Milwaukee I* the Court expressly stated that its holding that federal law governed interstate water pollution disputes was not limited to governmental bodies:

> "Thus, it is not only the character of the parties that requires us to apply federal law. *See Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237. . . . As Mr. Justice Harlan indicated for the Court in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 421-427, where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law." 406 U.S. at 105 n.6.

See also, Texas Industries, Inc. v. *Radcliff Materials, Inc., supra,* 451 U.S. at 641 n.13; *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 421-27 (1964).*

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* The Second Circuit's analysis conflicts with decisions in courts in the Third as well as the Seventh Circuits which have held that federal law applies in interstate water disputes even if the litigators are both private parties. *See National Sea Clammers Ass'n* v. *City of*

(footnote continued on following page)

Moreover, contrary to the suggestion of the courts below, the relief sought here—more than a hundred million dollars and injunctive relief which would, at the least, cause the reconstruction of a mill which is the largest employer in one of New York State's most economically depressed counties—cannot fairly be described as an "incidental intrusion" upon the sovereignty of New York. Nor can it be justified as a "mere supplement" to the FWPCA. If a lay jury in State B (let alone States C, D, E) could "supplement" the control of the EPA and State A over a given discharger by imposing through nuisance law new and possibly infeasible treatment requirements, either in the form of equitable relief or damage awards which will require process changes to avert future awards, the discharger would be subjected endlessly to increased expenses, operational disruption, perhaps even termination, and the FWPCA permitting process would be seriously undermined. Such a result is particularly unjustified where State B (such as Vermont) has taken the

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(footnote continued from preceding page)

New York, 616 F.2d 1222, 1233 (3d Cir. 1980) ("the common law nuisance remedy recognized in *Illinois* v. *City of Milwaukee* is available in suits by private parties"), *vacated and remanded on other grounds sub nom. Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *City of Evansville* v. *Kentucky Liquid Recycling Inc.*, 604 F.2d 1008, 1018-19 (7th Cir. 1979) (court cited *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co., supra*, to support its ruling that a municipal corporation could bring a federal common law action against a private defendant), *cert. denied sub nom. Louisville & Jefferson County Metropolitan Sewer District* v. *Evansville*, 444 U.S. 1025 (1980). A district court in New York has also reached a contrary result. *Byram River* v. *Village of Port Chester*, 394 F. Supp. 618, 622 (S.D.N.Y. 1975) (federal common law action brought by a private environmental organization and an individual). *See also*, McMahon, *The New Federal Common Law*, 13 For the Defense 83, 84 (1972); Note, *Environmental Law: Cause of Action Under Federal Common Law for Pollution of Interstate Waters*, 77 Dick L. Rev. 451, 456 (1973); Note, *Jurisdiction: Federal Common Law Under 1331(a)*, 52 Neb. L. Rev. 301, 305 (1973).

opportunity granted by the FWPCA to object to and participate in the issuance of a permit. Vermont agreed to (and even proposed certain of) the stringent limits in petitioner's permit that are now challenged by respondents as causing a nuisance.

Finally, the courts below rested their decision in part upon the conclusion that the FWPCA implicitly overruled *Milwaukee I*:

> "the Court [in *Milwaukee I*] also *implicitly assumed* that the discharge of pollutants, like the appropriation of water for personal consumption or reclamation, was simply another competing use of a limited resource . . . Since that opinion Congress, by the passage of the FWPCA, has expressly altered the assumptions on which *Milwaukee I* was based: although pollution is a competing use for interstate waters, it may no longer be considered a *legitimate competing* use." 602 F. Supp. at 272 (A19) (emphasis supplied).

This suggestion is simply irreconcilable with this Court's decision in *Texas Industries, Inc. v. Radcliff Materials, Inc., supra.* In *Texas Industries*, decided well after passage of the FWPCA, the Court cited *Milwaukee I* with approval for the principle that:

> ". . . federal common law exists only in such narrow areas as . . . interstate and international disputes implicating the conflicting rights of States . . . . In these instances, our federal system does not permit the controversy to be resolved under state law . . . because the interstate or international nature of the controversy makes it inappropriate for state law to control.
>
> . . .

> See, e.g., *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972) . . . . Many of these cases arise from interstate water disputes. Such cases do not directly involve state boundaries, disputes over which more often come to this Court under our original jurisdiction; they nonetheless involve especial federal concerns to which federal common law applies." 451 U.S. at 641 & 641 n.12.

In essence, the courts below took the position that a discharge in compliance with a NPDES permit is an illegitimate use of a waterway. Petitioner does not contend, and *Milwaukee III* did not hold, that an unregulated discharge of raw pollutants into a "limited resource" was "legitimate." The case held, and the statute recognizes, simply that a careful balance must be struck among the competing potential uses of interstate waters and that the striking of that balance is a matter of federal law (through the permitting process) as supplemented by the laws of the state where the discharge occurs. Any other view would render meaningless the entire FWPCA system.

C. The Issue Over Which the Seventh Circuit and Second Circuit Courts of Appeal Differ is Substantial and Will Arise Frequently

The Second and Seventh Circuits fundamentally disagree over whether a major federal statute—the Federal Water Pollution Control Act—permits suits in one state under its laws against an entity discharging effluents into interstate waters from another state. As the decisional law now stands, in the Second Circuit, a state or its citizens may sue in their courts for alleged injury from effluents discharged from other states, while in the Seventh Circuit, nuisance actions alleging injury from effluent discharges into interstate waters can only be brought in the state in which the discharger is located, and under the laws of that state.

The rulings below will have particularly pernicious consequences where an interstate body of water touches on several states—for example, the Mississippi River, which is bordered by ten states. Under the holding of the courts below, a suit for alleged pollution of that river could be brought in multiple courts under ten different states' nuisance laws. This would inevitably result in chaos for dischargers and sharp confrontations among states over the paramount authority to regulate a discharger. These results are directly contrary to the underlying regulatory purposes of the FWPCA: to promote consistency of discharge standards and state cooperation, and to vest paramount authority over a discharger in the federal government and the discharger's home state.

Standing alone, these actual and prospective conflicts over the proper interpretation of a major federal statute warrant this Court's consideration. And there is no reason to believe that the need for resolution by the Court will subside. The existing conflict between the Second and Seventh Circuits is not likely to resolve itself, particularly given that the Vermont district court awaited the decision from the Seventh Circuit, and then expressly rejected both the analysis and the holding of that court. Moreover, since the forty-eight contiguous states have borders contiguous with bodies of interstate waters, the issue is likely to recur frequently. In fact, the question has already arisen in an intermediate state court, *Tennessee* v. *Champion International Corp.*, 22 Env't. Rep. Cas. (BNA) 1338 (Tenn. Ct. App. 1985), *appeal granted* (Tenn. S. Ct. 1985). The Tennessee Court of Appeals held, expressly contrary to the Seventh Circuit, that an interstate water pollution action could be brought under Tennessee law in a Tennessee court against a discharger located in North Carolina. This case is currently pending before the Tennessee Supreme Court.

These are not the kinds of benign conflicts that should go unresolved, because the immediate repercussions are significant. For example, the consequences of the Second Circuit's decision for industries such as petitioner's which operate pursuant to effluent discharge standards, may be serious, if not paralyzing. If the courts below are correct, such dischargers must not only satisfy the standards mandated by the FWPCA, they must also comply with statutory and common law limits which may be defined in every state whose borders touch the body of water into which the discharges are made. Common law nuisance standards are based upon "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence." *Milwaukee II*, 451 U.S. at 312. As a result, as the Seventh Circuit recognized, it will be "virtually impossible" to predict what would constitute a lawful discharge. *Milwaukee III*, 731 F.2d at 414.

Moreover, this uncertainty and confusion will exist for petitioner, and others similarly situated, despite compliance with their permits issued under the Federal Water Pollution Control Act by the Environmental Protection Agency or the qualified state agencies. Petitioner's mill, for instance, has been the subject of extensive regulation pursuant to a 1974 settlement agreement among New York, Vermont, the EPA and petitioner and to the FWPCA permitting process. The 1974 Settlement Agreement terminated a lawsuit brought in 1970 by the State of Vermont in this Court against New York and petitioner, which alleged, *inter alia*, that discharges into the air and water from petitioner's plant constituted a nuisance (JA 119). *See Vermont* v. *New York*, 406 U.S. 186 (1972); *see also*, *Vermont* v. *New York*, 417 U.S. 270 (1974).

Contemporaneous with the 1974 Settlement Agreement, the EPA issued to the petitioner's mill a draft NPDES

permit pursuant to the FWPCA. That draft permit incorporated the discharge standards contained in the 1974 Settlement Agreement as well as additional requirements (JA 47). Pursuant to Sections 1319 and 1342 of the FWPCA, the EPA sent notice of the draft permit to the State of Vermont as an "affected state." Officials of Vermont as well as representatives of The Lake Champlain Committee (the principal private environmental organization in the Champlain Valley) participated in all subsequent negotiations among the EPA, New York and petitioner. (JA 48). The parties eventually reached complete agreement and the EPA issued a final NPDES permit for petitioner's mill on March 17, 1977 (JA 52). Petitioner installed a $3,000,000 addition to its waste water treatment system to achieve compliance with certain of the permit requirements.

Petitioner's permit is one of the most stringent in the country and contains detailed limits on nearly every component of the mill's discharge. Under the 1974 Settlement Agreement, petitioner makes detailed monthly reports on the performance of the waste water treatment system, including precise daily readings for numerous parameters, to New York, the EPA, and Vermont (JA 53).* If the decision below is allowed to stand, however, this federal permit and petitioner's compliance with it may well be irrelevant as petitioner will be subject to the statutory and common law of Vermont—one of the two states which helped formulate petitioner's permit.

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* On the basis of those reports and its own observations, the Environmental Conservation Agency of the State of Vermont stated in writing to the district court on September 23, 1981 that the "IPCo. discharge is currently well within the stringent permit limits . . . [and] . . . the effects of the present discharge on the Lake are minimal." (JA 183).

In short, the decision below destroys the balance of power between the federal government and the neighboring states established under the FWPCA and places petitioner, and others similarly situated, in the untenable position of being subject to regulation by the EPA, the state in which it is located, and to the potentially conflicting statutes, regulations and case law of all the states with borders contiguous with the interstate bodies of water into which its discharges are made.

CONCLUSION

The Court over the years has taken a keen interest in defining the framework within which interstate water pollution disputes are to be resolved. After passage of the "comprehensive" FWPCA, the remaining question relating to the interplay of state and federal law over such disputes is the extent, if any, to which the FWPCA authorizes states or their citizens to bring an action in their own courts under their own laws against an out-of-state discharger. The Court denied a writ of certiorari to review *Milwaukee III*, a case which could have served as a vehicle for resolution of this issue. However, at that time, as the Solicitor General pointed out, there was not a conflict on this issue in the Courts of Appeal. Such a conflict now exists, the Second Circuit having explicitly rejected the holding and analysis of the Seventh Circuit. Thus, there are two federal courts of appeal that have directly confronted and fully examined the issue. For the reasons stated, *see* discussion *supra* at 20-24, the issue is substantial and is likely to arise repeatedly. The holding of the court below subjects dischargers to the intolerable uncertainty of liability under a multitude of differing and possibly conflicting state nuisance laws in actions brought in different courts, undermining the state cooperation and uniformity contemplated in the FWPCA.

There is ample basis upon which to believe that such a result was not intended by the Congress, and that the court below simply misconstrued the applicable provisions of the Act. Petitioner submits that this case is in all respects an excellent vehicle for the Court to resolve the important federal question presented.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals
(November 4, 1985)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 201—August Term 1985

Argued: October 17, 1975 Decided: November 4, 1985

Docket No. 85-7506

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Plaintiffs-Appellees,

—against—

INTERNATIONAL PAPER COMPANY,

Defendant-Appellant.

Before:

KAUFMAN, PRATT, and MINER,

Circuit Judges.

Opinion of the Court of Appeals
(November 4, 1985)

SUSAN F. EATON, Middlebury, VT (Peter F. Langrock, Emily J. Joselson, Langrock Sperry Parker & Wool, Middlebury, VT; Smith, Harlow & Liccardi, Rutland, VT; Jeffrey L. Amestoy, Attorney General of the State of Vermont, Montpelier, VT, of Counsel), *for Plaintiffs-Appellees.*

JAMES W. B. BENKARD, New York, NY (Jamie Stern, John R. D'Angelo, Davis Polk & Wardwell, New York, NY; Dinse, Erdmann & Clapp, Burlington, VT, of Counsel), *for Defendant-Appellant.*

PER CURIAM:

By order dated February 5, 1985, the district court, Albert W. Coffrin, *Chief Judge,* denied defendant's motion pursuant to Fed. R. Civ. P. 12(c) and 56(b) to dismiss plaintiffs' cause of action concerning water pollution. *Ouellette* v. *International Paper Co.,* 602 F. Supp. 264 (D. Vt. 1985). The district court held (i) that the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* authorizes this action involving interstate water pollution claims by owners of property in Vermont against an effluent producer located in New York to be maintained in the courts and under the common law of the State of Vermont, where the alleged injuries occurred; (ii) that neither the Two-Party Agreement nor the Four-Party Agreement entered into by the State of Vermont in settlement of *Vermont* v. *New York,* 419 U.S. 955 (1974), bars this suit; and (iii) that plaintiffs have alleged sufficient special damages to state a claim for nuisance.

Opinion of the Court of Appeals
(November 4, 1985)

We affirm the order appealed from, essentially for the reasons set forth in Chief Judge Coffrin's thorough opinion, which we adopt in all respects except one. Chief Judge Coffrin distinguished *Badgley* v. *City of New York,* 606 F.2d 358 (2d Cir. 1979), *cert. denied,* 447 U.S. 907 (1980), finding that the settlement contract at bar differed "in two important ways" from the settlement decree and compact there. *Ouellette,* 602 F. Supp. at 273-74. We view his second distinguishing reason, grounded in the scope, terms, and language of the respective agreements, and, particularly, the differences in their "saving clauses," to be sufficient to remove this case from the *Badgley* principle. We express no view on what weight, if any, should be given to the first distinguishing reason mentioned by Chief Judge Coffrin; that unlike the settlement order and compact in *Badgley,* the contractual resolution of the prior dispute here received neither congressional nor judicial approval.

Affirmed.

Opinion of the District Court
(February 5, 1985)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Action File No. 78-163

HABMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs,

and

H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE, ELLEN THORNDIKE, WESLEY C. LARRABEE, VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Plaintiff-Intervenors,

v.

INTERNATIONAL PAPER COMPANY

Peter Langrock, Esq. and
Attorney Susan Eaton,
Langrock, Sperry, Parker & Wool,
Middlebury, Vermont, for
Plaintiffs, and

John Chase, Esq.,
Assistant Attorney General,
State of Vermont,
Montpelier, Vermont,
for Plaintiff Class Member,
State of Vermont,

Opinion of the District Court
(February 5, 1985)

James Benkard, Esq. and
Attorney Jamie Stern,
Davis, Polk & Wardwell,
New York, New York, and

Austin Hart, Esq.,
Dinse, Erdmann & Clapp,
Burlington, Vermont,
for Defendant,
International Paper Company

COFFRIN, Chief Judge

Having dealt with the defendant's objection to class certification in two previous opinions,[1] we are now presented with defendant's motion to dismiss plaintiffs' cause of action concerning water pollution pursuant to Rules 12(c) and 56(b) of the Federal Rules of Civil Procedure. Although defendant's motion was filed on June 22, 1981, the parties agreed (upon suggestion by the court) to await the Seventh Circuit's decision in the litigation brought by the State of Illinois and an Illinois resident against cities in Wisconsin and Indiana for pollution of Lake Michigan. That decision has now been rendered, *Illinois* v. *City of Milwaukee,* 731 F.2d 403 (7th Cir. 1984) (hereafter, "*Milwaukee 7th Cir.*"), *cert. denied sub nom. Scott* v. *City of Hammond,* 53 U.S.L.W. 3526 (U.S. Jan. 21, 1985), and, as anticipated, has illuminated many of the important issues raised by defendant's motion. Nevertheless, we depart somewhat from the conclusions drawn by the Seventh Circuit and, for the reasons below, deny defendant's motion to dismiss.

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[1] *Ouellette* v. *International Paper Co.,* 86 F.R.D. 476 (D. Vt. 1980); *Ouellette* v. *International Paper Co.,* No. 78-163 (D. Vt. Oct. 29, 1982).

BACKGROUND

As certified in our opinion of October 29, 1982, plaintiff class consists of the State of Vermont as well as of various Vermont residents owning property in Vermont on or near the "South Lake" area of Lake Champlain. Defendant, a New York corporation, operates a paper mill near Ticonderoga, New York, on the shore roughly opposite plaintiffs' property. In their complaint, plaintiffs allege two "Causes of Action" within which they incorporate numerous counts. The "First Cause of Action," which defendant now seeks to dismiss, contains plaintiffs, various claims and theories related to the alleged pollution of Lake Champlain by defendant's Ticonderoga paper mill. The "Second Cause of Action," which relates to plaintiffs claims for air pollution, is not at issue here.

Plaintiffs claim that discharges from defendant's paper mill have fouled the waters around plaintiffs' properties —which are used primarily for residential purposes but also for farming and some businesses such as marinas— interfering with the use and enjoyment of the property and, consequently, diminishing its value. Count I alleges that discharges from defendant's mill into the waters of Lake Champlain constitute "a continuing nuisance;" Count II alleges that defendant has violated its National Pollutant Discharge Elimination System (NPDES) permit by discharging pollutants into Lake Champlain in excess of the amounts specified in the permit; Count III alleges that defendant's discharges constitute an unreasonable riparian use; and Count IV alleges that defendant's discharges were negligent. Plaintiffs seek money damages and an injunction ordering defendant to relocate its water intake system closer to the source of its waste discharge system.

Defendant responds (1) that its Ticonderoga paper mill has been operating pursuant to and in compliance with an NPDES permit, (2) that federal rather than state law controls disputes involving interstate water pollution, and (3) that Congress, in passing the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (FWPCA), occupied the field of water pollution abatement, thereby barring any claim brought under federal common law for interstate water pollution. Relying on *Milwaukee 7th Cir., supra,* defendant claims that if Congress intended to allow any state common law action for abatement of pollution of interstate waters, it also intended that such a suit must be brought in the courts and under the laws of the state *in which the discharge occurred.* Defendant alternatively asserts that plaintiffs' rights as riparian owners have been resolved in prior proceedings. Finally, defendant alleges that even if plaintiffs were entitled to bring a state common law action grounded in nuisance, plaintiffs' failure to allege an injury different in nature from that suffered by the public in general deprives them of a cause of action for nuisance.

DISCUSSION

I. State Common Law and Interstate Water Pollution Disputes

A. *Illinois* v. *City of Milwaukee*

Because the issues in the case are similar to those which have arisen during the course of attempts by Illinois to control pollution of Lake Michigan emanating from various cities located outside of Illinois, we briefly recount the several opinions involved in the litigation reflecting these attempts.

In *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*) Illinois sought leave to file a bill of complaint under the Supreme Court's original jurisdiction against various Wisconsin cities and sewerage authorities. Illinois alleged that discharges of untreated sewage into Lake Michigan constituted a public nuisance. The Court, in denying Illinois leave to invoke its original jurisdiction, held that the federal common law of nuisance governed the dispute. *Id.* at 105 ("The question of apportionment of interstate waters is a question of "federal common law" upon which state statutes or decisions are not conclusive.") Although the Court held that, at the time of its decision, federal common law provided the basis for resolution of interstate water pollution disputes, it also recognized that "new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." *Id.* at 107.

Illinois promptly brought suit in the United States District Court for the Northern District of Illinois alleging, *inter alia*, that discharge of sewage into Lake Michigan by the Wisconsin cities created a public nuisance under both federal and Illinois common law and that it violated Illinois statutes. After a trial, the district court found for plaintiffs and granted injunctive relief mandating changes in defendant's sewage system. The Seventh Circuit affirmed but concluded that "it is federal common law and not State statutory or common law that controls in this case." *Milwaukee 7th Cir.*, 599 F.2d at 177 n.53.

Upon granting Milwaukee's petition for *certiorari* from that decision, the Supreme Court concluded that, with the passage of the 1972 Amendments to the FWPCA, Congress had since occupied the field of water pollution control by establishing a comprehensive regulatory program supervised

by an expert administrative agency. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981) (*Milwaukee II*). In so doing, Congress had supplanted any federal common law action for nuisance.[2]

On remand, Illinois again pressed its claim for injunctive relief, this time on the basis of Illinois law. In a similar action, Illinois and a resident of Illinois, a Mr. W. Scott, brought separate suits against the City of Hammond, Indiana, for pollution of Lake Michigan, alleging violations of Illinois statutory and common law. The suit was brought originally in Illinois state court but was later removed to the United States District Court for the Northern District of Illinois. Motion to remand the case to state court was denied. *Illinois* v. *Secretary, District of Hammond*, 498 F. Supp. 166 (N.D. Ill. 1980).

After Illinois prevailed over Milwaukee at trial, and the district court in the suit against the City of Hammond denied a motion by defendants to dismiss Illinois' state law claims,[3] *Scott* v. *City of Hammond*, 519 F. Supp. 292, 298 (N.D. Ill. 1981), the Seventh Circuit consolidated the two cases and considered the availability of a state law action seeking injunctive relief for the alleged creation of a public nuisance in interstate waters. Relying primarily on the Supreme Court's decision in *Milwaukee I*, the Seventh Circuit held that pollution of interstate waters is a "controversy

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[2] Illinois had also applied for *certiorari*, asserting that the Seventh Circuit erred in disregarding claims made by Illinois under Illinois' statutory and common law. Yet the Supreme Court in *Milwaukee II* specifically declined to pass on this question since it was the subject of Illinois' petition and not Milwaukee's. *Milwaukee II*, 451 U.S. at 310 n.4. The Court subsequently denied Illinois' petition. 451 U.S. 982 (1981).

[3] The district court certified its ruling for an interlocutory appeal under 28 U.S.C. § 1292(b).

of federal dimensions, implicating the conflicting rights of states and inappropriate for state law resolution." *Milwaukee 7th Cir.*, 731 F.2d at 410. The only role for state law in such disputes, according to the Seventh Circuit, was that which was specifically authorized by the 1972 FWPCA, the governing federal law. Reviewing the FWPCA, the Seventh Circuit concluded that, despite the language of 33 U.S.C. § 1370(2) (the "state authority" provision), Congress had provided no authority for one state (State A) or its citizens to use its *own* common or statutory law as a means to halt pollution discharged from facilities located in another state (State B). The court, however, did express its belief that Congress had authorized suits by State A or its citizens *in the courts of and under the laws of State B.* Because Illinois had brought suit in its own courts and used its own law, the consolidated cases were remanded for dismissal. On January 21, 1985, the Supreme Court denied plaintiff's petition for a writ of *certiorari, Scott* v. *City of Hammond,* 53 U.S.L.W. 3526 (U.S. Jan. 21, 1985), thus terminating that litigation.

Understandably, defendant in this case urges that we adopt the analysis and conclusions of the Seventh Circuit. *Milwaukee 7th Cir.* is an admirable attempt to deal with the difficult issues concerning the role of state law in controlling the pollution of interstate waters. It is clear that state law, in the absence of Congressional authorization, cannot control interstate water pollution controversies. *Milwaukee I* and *II* stand for the proposition that attempts by one state to halt discharge into interstate waters emanating from another state implicate uniquely federal concerns. When the issue is viewed as a problem of equitable apportionment—as it should be in the absence of a contrary expression by Congress—the competing and conflicting

interests of states and their citizens for limited quantities of interstate water mandate resort to federal law. The issue presented by the instant case, therefore, is not whether Congressional legislation *preempted* state statutory and common law as it relates to interstate water pollution since, according to *Milwaukee I*, federal law has *always* governed such disputes. Rather, the controlling question is the extent to which Congress authorized, either expressly or implicitly, resort to state common law in a situation such as this.

We differ from the Seventh Circuit in our perception of the extent to which Congress authorized resort to state law in the FWPCA. The Act creates a comprehensive regulatory scheme, the goal of which is to eliminate the discharge of pollutants into navigable waters by 1985. 33 U.S.C. § 1251(a)(1). Despite extensive federal oversight, Congress' express policy was to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution. . . ." 33 U.S.C. § 1251(b). Commensurate with this policy, the role played by the states within the Act's framework is an important one: states are expressly empowered to adopt or enforce any point source or water quality limitation or standards stricter than the minimum levels imposed by the Act, 33 U.S.C. §§ 1370(1), 1311(b)(1)(C), and to administer their own enforcement programs. 33 U.S.C. § 1319.

In addition to the powers afforded the states within the regulatory scheme imposed by the Act, Congress included a "saving clause" providing that "nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370. Furthermore, the "state authority" section of the Act, 33 U.S.C. § 1365(e), similarly states

that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ." Plaintiffs contends that these two sections authorize the application of Vermont common law to remedy an injury caused by discharges of pollutants emanating from defendant's paper mill in New York. We agree.

There are, perhaps, three ways to interpret the saving clause and state authority provision of the Act in light of Supreme Court decisions. Note, *City of Milwaukee* v. *Illinois: The Demise of the Federal Common Law of Water Pollution*, 1382 Wis. L. Rev. 627, 664-71. The most restrictive interpretation would be that Congress intended to save state common law only as it applied to waters which are outside of the FWPCA's jurisdiction. Since as much as ninety to one hundred percent of the nation's waters fall within the definition of "navigable waters" (to which the Act applies), *id.* at 666., this view of the Act would render state law practically meaningless. Furthermore, under this interpretation of the Act, a person injured by pollution in "navigable water" would be unable to recover damages from the polluter since the Act does not provide a damage remedy for private actions. *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1, 13-18 (1981). It is simply inconceivable that Congress intended to deprive a party injured by water pollution of all compensation for that injury. Such a result would be antithetical to the ends of the Act. It would also implicitly contradict Congressional intent as expressed in the Senate Report accompanying 33 U.S.C. § 1365(e):

> It should be noted, however, that this section would specifically preserve any rights or remedies under any other law. *Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.*

S. Rep. No. 92-414, 92d Cong., 2d Sess. 81, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3746-47 (emphasis added). That state law actions were preserved is clear; the question is the extent to which they were preserved.

A second possible interpretation of the saving clause and citizen suit provisions of the Act is that they preserve a state's nuisance law only as it applies to discharges emanating from within that state or its boundary waters. This is the position suggested in *Milwaukee 7th Cir.* Although we find this view more plausible than the first, more restrictive interpretation, there is simply nothing in the Act which suggests that Congress intended to impose such limitations on the use of state law. We therefore adopt the third possible interpretation—that the Act authorizes actions to redress injury caused by water pollution of interstate waters through the laws of the state in which the injury occurred. We now set forth our reasons for departing from *Milwaukee 7th Cir.*'s adoption of the second interpretation.

The Seventh Circuit—having concluded that, under *Milwaukee I*, state law remedies were inappropriate for the resolution of disputes such as that between Illinois and Milwaukee—reasoned that the saving clause could not preserve traditional state remedies since there was no right or juridiction to be saved. *Milwaukee 7th Cir.*, 731 F.2d at 413. The court held that "[I]n the light of the structure of FWPCA and the potential conflict and confusion, we think Congress intended no more than to save the right

and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters." *Id.* (footnote omitted).

Without any textual support in the Act, this conclusion appears to be *post hoc* speculation as to what Congress *would* have intended *had it known* at the time of the Act's creation that the Supreme Court, in *Milwaukee I*, would hold that federal common law preempted state common law. The legislative history reveals, however, that at the time the FWPCA was formulated, state law rather than federal common law was applicable to interstate pollution disputes. As the Supreme Court noted in *Milwaukee II*:

> It must be noted that the legislative activity resulting in the 1972 Amendments largely occurred prior to this Court's [1972] decision in *Illinois* v. *Milwaukee* [*Milwaukee I*]. Drafting, filing of Committee Reports, and debate in both Houses took place prior to the decision. Only conference activity occurred after. It is difficult to argue that particular provisions were designed to preserve a federal common law remedy not yet recognized by this Court.
>
> . . . During the legislative activity resulting in the 1972 Amendments, . . . this Court's decision in *Ohio* v. *Wyandotte Chemical Corp.*, 401 U.S. 493 (1971), indicated that *state* common law would control a claim such as Illinois.' *Wyandotte*, like the present suit, was brought by a State to abate a pollution nuisance created by out of state defendants. The Court ruled that an "action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938)." *Id.*, at 498-99 n.3. The Court in [*Milwaukee I*] found it necessary to overrule this statement, see 406 U.S. at 102 n.3.

451 U.S. at 327 n.19.

The Court's opinion as to the applicability of state law, *Ohio* v. *Wyandotte Chemical Corp.*, 401 U.S. 493, 500 (1971)—which involved a dispute among several states and Canada concerning pollution of Lake Erie—was simply an exppression of traditional tort law and choice of law principles existing at that time. The Supreme Court had previously summarized those principles in *Young* v. *Masci*, 289 U.S. 253 (1933):

> A person who sets in motion in one state the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed by a responsible agent or an irresponsible instrument. The cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it. Thus, liability is commonly imposed under such circumstances for homicide, for maintenance of a nuisance, for blasting operations, and for negligent manufacture.

Id. at 258-59 (citations omitted).

Given the state of the law during the time of the FWPCA's framing, it is completely reasonable to assume that Congress believed that a plaintiff suffering in State A might sue under the laws of State A to recover for injuries sustained as the result of pollution emanating from State B. It thus seems inescapable that Congress, by passage of the FWPCA's saving clause and state authority provisions, intended to preserve just such an action. In basing its decision

on an incompatibility of state and federal law not yet recognized by Congress at the time of FWPCA's creation; *Milwaukee 7th Cir.* thus imposed artificial limitations on the right to bring a state common law nuisance action.

The Seventh Circuit's position also creates a choice-of-law rule that deviates, without legislative authorization, from well-settled choice of law principles. *Milwaukee 7th Cir.* would, in settling disputes over interstate pollution, mandate that, where state law was sought to be applied, courts apply the law of the state from which the pollution emanates regardless of the states' choice-of-law principles. Yet the FWPCA provides no support for this deviation from the rule that, in a diversity case, a federal court must apply choice of law principles of the state in which the court sits. *Klaxon* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).[4]

Another factor weighing against the adoption of the position espoused in *Milwaukee 7th Cir.* is that the conclusions reached are logically inconsistent. The Seventh Circuit concluded that the saving clause contained in the FWPCA could not save Illinois' "right" to bring an action against Milwaukee under Illinois law since, according to *Milwaukee I*, there was no such right to be saved. *Milwaukee I*, however, did not distinguish between water pollution emanating from outside the forum state's boundary waters and that emanating from within. That decision simply held that state law was ill-suited to resolve any dispute between two states concerning the pollution of interstate waters. There is nothing in *Milwaukee I* to suggest that the Supreme Court

[4] *See also Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3, 4 (1975) ("A federal court is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.")

would have approved a suit by Illinois in the courts of and pursuant to the laws of Wisconsin. Using the Seventh Circuit's own analysis, then, the FWPCA did not save Illinois' right to sue in Wisconsin's courts under Wisconsin law since there was no such right to be saved. The Seventh Circuit nevertheless suggested that Congress, by inclusion of the saving clause, must have meant to save state law as it applied to in state discharges.

This inherently contradictory conclusion was apparently an attempt by the court to reconcile the express language of the saving clause and accompanying legislative history with the problems which the court believed would result from the application of state law in interstate water pollution disputes. In the situation presented here, however, nothing in the application of traditional common law remedies for nuisance would, as a practical matter, interfere with the objectives of the Act. In fact, the opposite is true. Congress, in passing the Act, sought "to restore and maintain the natural chemical, physical, and biological integrity of the Nation's waters" by eliminating the discharge of pollutants into navigable waters. S. Rep. 92-414, 92d Cong., 2d Sess. 81, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3678. To this end, states' imposition of compensatory damage awards and other equitable relief for injuries caused by discharges into interstate waters merely *supplement* the standards and limitations imposed by the Act.

Defendant's implied position is that application of state law principles might interfere with defendant's "right" to discharge under its NPDES permit. Yet there is no indication that Congress ever intended that the NPDES permit confer an absolute right to discharge to the extent allowed by the permit. Since compliance with the Act does not constitute a defense to a common law action for damages,

see S. Rep. 92-414, *supra,* Congress must have recognized that some uncertainty would result to discharges of pollutants. The goal of the FWPCA is not finality; rather, it is the elimination of the discharge of pollutants.

Finally, we disagree with the defendant's contention that application of state nuisance law in a situation such as this may lead to a "chaotic confrontation between sovereign states." Unlike *Milwaukee 7th Cir.*, the dispute here is between private parties. There is little or no possibility that this litigation will escalate into a conflict between different state entities.[5]

Even disregarding the nature of the parties involved, the common law action involved here does not directly implicate the regulatory powers of the states in which the parties are located. Plaintiffs have not attempted to impose legislatively defined standards or limitations on defendant. Plaintiffs seek compensatory damages, the purpose of which, of course, is to compensate parties for injuries or for interference with the use and enjoyment of their property. Such damages may have an indirect regulatory effect, yet the discharger remains free to operate so long as it pays for the injury it causes. *Cf. Silkwood* v. *Kerr-McGee Corp.*, 52 U.S.L.W. 4043, 4050 (U.S. Jan. 11, 1984) (Blackmun, J., dissenting) (alleged contamination from federally-licensed nuclear facility; compensatory damages awarded under state law complement the federal regulatory standards, and are an implicit part of the federal regulatory scheme). Although an injunction to abate a nuisance has a direct impact on the polluter, it is designed primarily to

[5] Although the State of Vermont, as a riparian landowner, has been included in the plaintiff class, *see Ouellette* v. *International Paper Co.*, No. 78-163 (D. Vt. March 27, 1983), the State's actions are presumably controlled by the settlement agreements previously entered into with IPC. *See* Section II, *infra.*

redress a plaintiff's particular injury. In this respect, any intrusion on the sovereignty of the polluter's state is purely incidental. A state's nuisance law develops not to regulate the activity of neighboring states but to protect the health, welfare, and property rights of its own residents. The application of state law in this situation is no more intrusive on the sovereignty of foreign states than the application of one state's product liability law to a manufacturer located in another state. *See e.g. Watson* v. *Employers Liability Corp.*, 348 U.S. 66 (1954), *Bowles* v. *Zimmer Mfg. Co.*, 277 F.2d 868, 872-77 (7th Cir. 1960).

Congressional authorization of state law in a situation such as this does not necessarily contradict the rationale employed by *Milwaukee I.* There the Court—relying on case law applied to disputes over the apportionment of interstate waters—held that state law action was an inappropriate means to resolve interstate water pollution disputes. But the Court also implicitly assumed that the discharge of pollutants, like the appropriation of water for personal consumption or reclamation, was simply another competing use of a limited resource. Federal law was necessary to effect an equitable means of "dividing the pie," *see Milwaukee 7th Cir.* Since that opinion Congress, by the passage of the FWPCA, has expressly altered the assumptions on which *Milwaukee I* was based: although pollution is a competing use for interstate waters, it may no longer be considered a *legitimate* competing use. Thus it would appear that the Act has shifted the controlling issue from how to "divide the pie" to how best to eliminate the discharge of pollutants into the nation's waters. Consideration of the express language of the saving clause and state authority provision of the Act, the legislative history, and the state objectives of the Act inevitably lead one to the con-

clusion that Congress intended to authorize resort to state nuisance law in situations such as the instant one.

II. State Disposition of Plaintiffs' Riparian Rights

In 1970, the State of Vermont brought an action in the United States Supreme Court against the State of New York and IPC alleging, *inter alia,* that IPC's discharges into the air and water constituted a nuisance and a trespass. After the United States intervened, negotiations among the parties led to a consent decree which was ultimately rejected by the Supreme Court. *State of Vermont* v. *State of New York,* 417 U.S. 270 (1974). The parties then stipulated to a settlement that included the filing of a Motion to Dismiss without Prejudice. The complaint was dismissed by the Court on October 29, 1979. 419 U.S. 955 (1974). Although the settlement agreements were apparently filed with the Stipulated Motion to Dismiss, the terms of the settlement were never before the Court.

There are two Agreements of Settlement in this case: one between the State of Vermont and IPC, ("Two-Party Agreement"), the other between the State of Vermont, the State of New York, IPC and the United States ("Four-Party Agreement"). Both Agreements provide:

> This Agreement shall constitute a contract in settlement of No. 50, Original, but shall not constitute an adjudication or finding on any issue of fact or law, or evidence or admission by any party with respect to any such issue raised therein. In consideration of the mutual rights and obligations set forth, the following provisions are agreed to and accepted by the parties and shall be binding upon them respectively.

Both Agreements are thus purely contractual in nature. In exchange for certain concessions and money payments by IPC, the State of Vermont pledged, in both Agreements, not to

> seek to recover from any party to No. 50, Original damages for harm to the South Lake, its waters, shores, adjacent acres . . . allegedly suffered on or prior to the entry of an order dismissing the amended complaint in No. 50, Original for which the State of Vermont could have sought recovery in No. 50, Original.

¶ III(A)(2) of the Two-Party Agreement (the Four-Party Agreement contains a similar provisions at ¶ IV(A)(2)).

The State also agreed that, for a given time period, it would not support limitations more stringent than those contained in the Agreement. Yet the Agreements also contain the following clause:

> Nothing herein shall be construed as affecting any claims or rights of any citizens or residents of the State of Vermont that may exist againt any party to No. 50, Original.

¶ IV(F) of the Two-Party Agreement (the Four-Party Agreement contains a similar provision at ¶ VI(F)).

Defendant, relying on *Badgley* v. *City of New York,* 606 F.2d 358 (2d Cir. 1979), contends that the plaintiffs here are bound by the state's covenant not to sue contained in the Agreements. According to defendant, individual Vermont landowners were represented by the State of Vermont, and their riparian rights were fully adjudicated and settled under the terms of the Agreements. Plaintiffs' water pollution claim, defendant reasons, should therefore be dismissed. We disagree.

In *Badgley*, owners of riparian land situated in Pennsylvania claimed that diversion, impoundment and manipulation of the headwaters of the Delaware River by the City of New York had caused a diminution of the value of their lands. The City countered that its conduct was authorized by the Supreme Court's equitable apportionment of the Delaware River's waters. *See New Jersey* v. *New York*, 347 U.S. 995 (1954).

After a trial which resulted in a damage award for plaintiffs, the Second Circuit considered whether or not the district court had erred in holding that common law riparian rights in streams are not destroyed or altered when those streams have been apportioned by a Supreme Court decree involving the common law doctrine of equitable apportionment. The court concluded that Pennsylvania—as a party to a consent decree entered by the Supreme Court setting forth the rights of the riparian states along the Delaware, *New Jersey* v. *New York*, *supra*, and as a signer of the Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961), had represented the rights of all its citizens. The terms of the decree and the compact were thus held conclusive upon all Pennsylvania residents and bound their rights. *Badgley*, 606 F.2d at 364.

A review of the Two- and Four-Party Agreements in the instant case, however, show that the settlement contracts to which the State of Vermont was a party differ in two important ways from the decree and compact to which Pennsylvania was a party.

First, a significant factor in *Badgley* was that an award of damages to plaintiffs in that case might have "hobble[d] or possibly even destroy[ed] the effect of Supreme Court decrees of Congressionally approved interstate water compacts,' *Id.* at 366. Here, however, although the settlement

agreement resolved a dispute subject to the Supreme Court's original jurisdiction, the Two- and Four-Party Agreements had received neither Supreme Court nor Congressional approval. By their express terms, the Agreements purport to be a contractual resolution of the controversy involving only the signing parties.

Second, and perhaps more important, the Delaware River decree and compact established "a *comprehensive* scheme of river regulation, all-inclusive as to all matters concerning the manipulation of the law of the undiverted portion of the Delaware River." *Id.*, 606 F.2d at 368 (emphasis added). In contrast, it appears from the Agreements in this case that the State of Vermont did not agree to a comprehensive allocation of discharge rights in the South Lake area but only to forbear from bringing suit against IPC or from proposing stricter limitations or conditions so long as IPC adhered to the limitations and conditions set forth.[6] The "saving clause" included in both Agreements confirms this construction of the Agreements. Unlike the "saving clause" at issue in *Badgley*,[7] the clause contained in the

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[6] Moreover, the Agreements applied only as to harm suffered on or prior to October 29, 1974, the date of the Supreme Court's Order of Dismissal, reported at 419 U.S. 955. *See, e.g.*, ¶ III(A)(2) of the Two-Party Agreement, quoted *supra*, and ¶ IV(A)(2) of the Four-Party Agreement. Thus, even if we were to hold that the rights of private individuals within Vermont to bring this action extended no further than that of the state itself, we would still allow recovery for harm which occurred after that date.

[7] The "saving clause" in the Delaware River Basin Compact addressed by the court in *Badgley* provided: "Nothing contained in this compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective signatory position relating to riparian rights." *Id.*, 606 F.2d at 371. Not only is this not as specific as the clause in the instant case, but the court held that it was inconsistent with other clauses within the same compacts. *Id.*

Two-Party Agreement ***specifically preserves any claims and rights of Vermont citizens and residents*** that may exist against any party to the Supreme Court proceeding. Only the most tortured construction of this clause would prevent Vermont residents from recovering for injuries sustained as a result of pollution emanating from IPC's mill.[8]

It seems clear that the State of Vermont bargained for a reduction of effluents in return for a limited covenant not to file suit itself—nothing more. The State of Vermont did not, therefore, dispose of plaintiffs' riparian rights in signing the Two- and Four-Party Agreements.

III. Public Nuisance

Defendant contends that plaintiffs have not alleged that they suffered harm different in kind from that suffered by the public in general, a necessary element of a private action for public nuisance under both New York and Vermont common law. *Roy v. Farr,* 128 Vt. 30, 37, 258 A.2d 799, 803 (1969); *Gibbons* v. *Hoffman,* 203 Misc. 26, 115 N.Y.S.2d 632 (1952); Restatement (Second) of Torts § 821C at 94 (1979). Plaintiffs allege in their complaint, however, that the discharges from defendant's mill "interfere with Plaintiffs' use and enjoyment of their property and have decreased the market value and rental value of their property." Such an allegation is sufficient to state

[8] Apparently a significant factor in *Badgley* was the court's conclusion that the rights of riparian owners were not independent of the rights of Pennsylvania, but were merely derivative therefrom and therefore subject to change by Pennsylvania law. *Badgley,* 606 F.2d at 365. This does not alter our holding, however, since the saving clause at issue here could be viewed as a retained right of *the state*—that is, the clause retains the state's right to have claims brought by its citizens and residents resolved by the courts. Viewed from either perspective, the clause clearly excepts claims brought by private citizens or residents from any bar of access to the courts.

a private cause of action for a "nuisance" which might generally be classified as "public." *See Hazen* v. *Perkins,* 92 Vt. 414, 421-22, 105 A. 249 (1918) (where variations in lake depth caused by defendant's dam "accentuated" adverse effects upon plaintiffs' shore properties, injury was "special and distinct," though injury was not substantial); *see also W. Prosser, The Law of Torts* § 88, at 588 (4th ed. 1971); 58 Am. Jur. 2d, *Nuisance* § 111, at 675 (1971) ("Interference with the enjoyment and value of a person's private property rights is a special injury [allowing] recovery from a public nuisance . . . "); Restatement (Second) of Torts § 821C, comments d and e (1979) ("When the public nuisance causes . . . physical harm to [plaintiff's] land . . ., the harm is normally different in kind from that suffered by other members of the public . . .").

CONCLUSION

We find that the FWPCA authorizes actions to redress injury caused by water pollution of interstate waters under the common law of the state in which the injury occurred; that the State of Vermont did not dispose of plaintiffs' riparian rights when it entered into settlement agreements with IPC and the State of New York; and that plaintiffs have set forth allegations of harm sufficiently different in kind than that suffered by the general public to state a claim for nuisance. Accordingly, defendant's motion to dismiss is hereby Denied.

Dated at Burlington in the District of Vermont, this 5th day of February, 1985.

/s/ Albert W. Coffrin
Albert W. Coffrin
Chief Judge

Order and Judgment of the Court of Appeals
(November 4, 1985)

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

Docket No. 85-7506

(SEAL)

At a state Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of November, one thousrand nine hundred and eighty-five.

Present:

HON. IRVING R. KAUFMAN
HON. GEORGE C. PRATT
HON. ROGER J. MINER,
Circuit Judges,

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOUIS T. PATTERSON,

Plaintiffs-Appellees,

v.

INTERNATIONAL PAPER COMPANY,

Defendant-Appellant.

Order and Judgment of the Court of Appeals
(November 4, 1985)

Appeal from the United States District Court for the District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH,
Clerk

By: EDWARD J. GUARDARO
Deputy Clerk

Text of Statutes Relied On
Federal Water Pollution Control Act
§ 1253, 33 U.S.C. § 1253

"§ 1253. Interstate cooperation and uniform laws

(a) The Administrator shall encourage cooperative activities by the States for the prevention, reduction, and elimination of pollution, encourage the enactment of improved and, so far as practicable, uniform States laws relating to the prevention, reduction, and elimination of pollution; and encourage compacts between States for the prevention and control of pollution.

(b) The consent of the Congress is hereby given to two or more States to negotiate and enter into agreements or compacts, not in conflict with any law or treaty of the United States, for (1) cooperative effort and mutual assistance for the prevention and control of pollution and the enforcement of their respective laws relating thereto, and (2) the establishment of such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts. No such agreement or compact shall be binding or obligatory upon any State a party thereto unless and until it has been approved by the Congress."

Federal Water Pollution Control Act
§ 1319, 33 U.S.C. § 1319

"§ 1319. Enforcement

STATE ENFORCEMENT; COMPLIANCE ORDERS

(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B)

of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for

compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge

into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

CIVIL ACTIONS

(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

CRIMINAL PENALTIES

(c)(1) Any person who willfully or negligently violates section 1311, 1312, 1316, 1317, 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State or in a permit issued under section 1344 of this title by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more

than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

CIVIL PENALTIES

(d) Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

STATE LIABILITY FOR JUDGMENTS AND EXPENSES

(e) Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a

party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

WRONGFUL INTRODUCTION OF POLLUTANTS INTO TREATMENT WORKS

(f) Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 1317 of this title, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter."

"§ 1341. Certification

COMPLIANCE WITH APPLICABLE REQUIREMENTS; APPLICATION; PROCEDURES; LICENSE SUSPENSION

(a)(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable

period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to

insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

COMPLIANCE WITH OTHER PROVISIONS OF LAW SETTING APPLICABLE WATER QUALITY REQUIREMENTS

(b) Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

Federal Water Pollution Control Act
§ 1341, 33 U.S.C. § 1341

AUTHORITY OF SECRETARY OF ARMY TO PERMIT USE OF SPOIL DISPOSAL AREAS BY FEDERAL LICENSEES OR PERMITTEES

(c) In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

LIMITATIONS AND MONITORING REQUIREMENTS OF CERTIFICATION

(d) Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section."

Federal Water Pollution Control Act
§ 1342, 33 U.S.C. § 1342

"§ 1342. National pollutant discharge elimination system

PERMITS FOR DISCHARGE OF POLLUTANTS

(a)(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their terms unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begin on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(h)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permits shall issue if the Administrator objects to such issuance.

STATE PERMIT PROGRAMS

(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a

statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure com-

pliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

SUSPENSION OF FEDERAL PROGRAM UPON SUBMISSION OF STATE PROGRAM; WITHDRAWAL OF APPROVAL OF STATE PROGRAM

(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this

section or does not conform to the guidelines issued under section 1314(h)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(h)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

NOTIFICATION OF ADMINISTRATOR

(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit

as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, or request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

WAIVER OF NOTIFICATION REQUIREMENT

(e) In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

POINT SOURCE CATEGORIES

(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines

shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

OTHER REGULATIONS FOR SAFE TRANSPORTATION, HANDLING, CARRIAGE, STORAGE, AND STOWAGE OF POLLUTANTS

(g) Any permit issued under this section for the discharge of pollutants into the navigable water from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

VIOLATION OF PERMIT CONDITIONS; RESTRICTION OR PROHIBITION UPON INTRODUCTION OF POLLUTANT BY SOURCE NOT PREVIOUSLY UTILIZING TREATMENT WORKS

(h) In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any

pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

FEDERAL ENFORCEMENT NOT LIMITED

(i) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

PUBLIC INFORMATION

(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

COMPLIANCE WITH PERMITS,

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the

application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

IRRIGATION RETURN FLOWS

(*l*) The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit."

Federal Water Pollution Control Act
§ 1365, 33 U.S.C. § 1365

"§ 1365. Citizen suits

AUTHORIZATION; JURISDICTION

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

NOTICE

(b) No action may be commenced—

(1) under subsection (a)(1) of this section--

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

VENUE; INTERVENTION BY ADMINISTRATOR

(c)(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

LITIGATION COSTS

(d) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

STATUTORY OR COMMON LAW RIGHTS NOT RESTRICTED

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

EFFLUENT STANDARD OR LIMITATION

(f) For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; or (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title).

Federal Water Pollution Control Act
§ 1365, 33 U.S.C. § 1365

CITIZEN

(g) For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

CIVIL ACTION BY STATE GOVERNORS

(h) A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.'

Federal Water Pollution Control Act
§ 1370, 33 U.S.C. § 1370

"§ 1370. State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."